STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY	**)**	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	**)**	
LOCAL NO. 1007,	**)**	
Charging Party,	**)**	
	)	**ULP No. 01-06-320**
v.	**)**	
	)	
DELAWARE STATE UNIVERSITY,	**)**	
Respondent	**)**	

The Delaware State University ("University") is a public employer within the meaning of Section 1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) ("Act"). The American Federation of State, County and Municipal Employees, Council 81, Local No. 104 ("AFSCME" or "Union") is an employee organization within the meaning of Section 1302(i) of the Act and the exclusive bargaining representative of certain employees of the University within the meaning of Section 1302(j) of the Act.

On June 19, 2001, AFSCME filed the instant unfair labor practice charge alleging that on or about May 23, 2001, the University, without prior negotiation with the Union informed the Assistant Resident Managers ("ARM's") and the Night Desk Staff ("NDS") of its decision to reduce the annual period of their employment from twelve (12) months to ten (10) months. **[1]**

The charge alleges the University's action violated Section 1307(a) (5), of the Act. The charge also alleges that by communicating directly with bargaining unit members without negotiating with or

informing the Union the University violated Sections 1307 (a) (1), (2), (3) and (5), of the Act, which provide:

> 1307. Unfair labor practices.
>
> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
>
> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
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> (3) Encourage or discourage membership in any employee organization by discrimination in regards to hiring, tenure or other terms and conditions of employment.
>
> (5) Refuse to bargain in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

On July 5, 2001, the University filed its Answer denying the alleged violations. The Answer also sets forth the following New Matter and Affirmative Defenses:

> 1. The PERB lacks jurisdiction because resolution of the Charge requires the interpretation of the parties' collective bargaining agreement.
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> 2. Despite Charging Party's allegations to the contrary, Respondent did meet and discuss the proposed changes with Charging Party.

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[1] Three (3) classifications of employees are responsible for monitoring each of the University's seven (7) residence halls. A Resident Manager is on duty from 8:00 a.m. to 4:00 p.m., an Assistant Resident Manager is on duty from 4:00 p.m. to 12:00 midnight and a Night Desk Staff is on duty from 12:00 midnight until 8:00 a.m.

3. Pursuant to the negotiated agreement between Respondent and Charging Party, Respondent has the right to change or eliminate existing jobs.

4. Prior to notifying the affected staff, Respondent had met with Charging Party and given notice that the bargaining unit employees would be notified of the change.

5. By informing the ARM's and NDS, Respondent did not intend to circumvent or embarrass Charging Party.

Included in the Answer was a Counter-Charge alleging conduct by the Union in violation of Section 1307 (b) (2), of the Act, which provides: **[2]**

1307. Unfair labor practices.
(b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith with a public employer or its designated representative if the employee organization is an exclusive representative.

On July 16, 2001, Charging Party filed its Response essentially denying the New Matter, Affirmative Defenses and the allegations set forth in the Counter-Charge.

A finding of Probable Cause was issued on August 14, 2001. A hearing was held on November 7, 2001, at which the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was presented in the form of written post-hearing memoranda, the last of which was received on February 19, 2001. The following discussion and decision result from the record thus compiled.

[2] The Counter-Charge was subsequently withdrawn by the University.

BACKGROUND

The material facts are essentially undisputed.

Approximately late April, 2001, Dr. Charles Smith, Vice President of Enrollment Management and Student Affairs, and Pam Trego, President of AFSCME Local 1004, spoke briefly in the faculty dining room. Dr. Smith informed President Trego that the University intended to reduce the work schedule of the Assistant Residence Managers and the Night Desk Staff from twelve (12) months to ten (10) months and inquired if he needed to notify the Union. President Trego responded in the affirmative.

Following this conversation, President Trego consulted with Esther Savage, the Union Shop Steward servicing the affected employees. Ms. Savage informed President Trego that during a recent staff meeting Dr. Christopher Curry, Director of Residence Life, informed the staff of the University's intention to reduce the work schedule of the Assistant Residence Managers and the Night Desk Staff.

On or about May 10, 2001, a meeting was held to discuss the matter. In attendance were Dr. Smith; Clifton Coleman, Director of Human Resources; Luan Pitt, Assistant Vice President for Student Affairs (including Resident Life); President Trego; and Anthony Camponelli, Staff Representative for AFSCME, Council 81. Although minor differences exist concerning the content of the meeting, there is no dispute a discussion occurred between Mr. Coleman and Mr. Camponelli concerning whether the University possessed the authority necessary to unilaterally implement the schedule change or whether prior negotiation with the Union was required. Mr. Camponelli stated words to the effect that, "you do what you have to do and we'll do what we have to do." At the conclusion of the meeting, Dr. Smith believed the Union had agreed to the schedule change. It is undisputed, however, there was no express consent from the Union representatives present.

On or about May 23, 2001, Dr. Smith sent a personalized form letter to the employees in the ARM and NDS classifications. The letter sent to Assistant Resident Manager, Esther Savage, provides:

> Over the last three (3) years, we have been
> working extremely hard to bring our Housing
> and Residence Life operation in line with other

> colleges and universities in the region and the country and to reduce the escalating operating costs. Currently, our operation is constantly running a deficit. All Housing and Resident Life operations are supposed to be self-supporting. As we move closer to this goal, it has become necessary to make another adjustment. Therefore, beginning with the new Academic year, all Assistant Resident Manager positions will change to ten months. This means that you will end your 2001-2002 work year on May 31, 2002 and return on August 1, 2002. From that point on you will work from August 1 to May 31 and you will be paid for ten months. In the 2002 year, you will not receive a check for June and July unless you elect to have your pay spread over twelve months. Your pay will decrease from $23,055 to $19,213 annually. This does not include any increases that you may receive for the fiscal year 2001-2002. If you have any questions, please give Mr. Curry or Ms. Pitt a call. (Union Ex. No. 7)

At some point thereafter, President Trego informed Dr. Smith that the affected employees should be notified of the impact of the schedule change upon their benefit coverage. On June 5, 2001, Dr. Smith sent the following Memorandum to all affected employees:

> In my letter dated May 23, 2001, I indicated that your position would become a ten month position in 2001-2002. The change in the number of months worked will not affect your benefits. There are several ways to handle this and I have listed a couple below, but would encourage you to talk with Mr. Clifton Coleman or Mrs. Sheila Davis in the

Human Resource Office. You may decide to:

- Have your pay spread over twelve months and this would satisfy your benefits or,

- Have your pay spread over ten months and pay a triple share for benefits in the last month.

If you have questions, or concerns, please make an appointment with Human Resources.

Sometime during July, 2001, the affected employees received a third communication requesting that they designate whether they desired to be paid on a twelve (12) or ten (10) month basis.

Numerous employees wrote letters during the months of May and June, 2001, objecting to the reduced work schedule. It is unclear whether Dr. Smith ever saw the letters prior to the November 7th hearing in this matter.

ISSUES

1. Whether the modification in the work schedule of the Assistant Resident Managers and the Night Desk Staff positions from twelve (12) months to ten (10) months constitutes a mandatory subject of bargaining or a matter of inherent managerial policy about which the University is not required to bargain?

2. If the referenced modification constitutes a mandatory subject of bargaining did the Union waive its right to bargain over the modification?

3. If not, did the University satisfy its duty to bargain over mandatory subjects of bargaining?

PRINCIPAL POSITIONS OF THE PARTIES

Union: Rather than a matter of inherent managerial policy, as the University contends, the length of the work year is an economic issue about which the University is required to bargain. Consequently, the balancing test established in Appoquinimink Ed. Ass'n. v. Bd. of Ed. Del. PERB, I PERB 35, 50 (1984), for determining the bargaining status of a subject which qualifies as both a term and condition of employment and an inherent managerial prerogative is inapplicable.

Should it be determined that the reduction in hours constitutes both a term and condition of employment and an inherent managerial policy, so that the application of the balancing test is required, the impact of the change upon the individual employee clearly outweighs the impact upon the operation of the University.

Contrary to the University's contention, the Union did not waive its right to bargain over the change in the scheduled hours of work, the rate of pay or the impact of the change upon the employees' benefit coverage.

University: The decision to modify the Assistant Resident Manager and the Night Desk staff positions from twelve (12) months to ten (10) months is a matter of inherent managerial policy about which the University is not required to bargain.

Although the decision to modify the schedule impacts the wages and hours of the affected employees, after applying the Appoquinimink balancing test (Supra.) it is clear that the impact of the change upon the overall operation of the University will be greater than its impact upon the individual employees.

Even if it is determined that modifying the schedule constitutes a mandatory subject of bargaining the Union, by its conduct during and immediately following the May 10, 2001, meeting, waived its right to bargain over the proposed change.

DISCUSSION

The application of the balancing test adopted in Appoquinimink (Supra.) was addressed in Woodbridge Ed. Ass'n. v. Bd. of Ed., Del. PERB, ULP No. 90-02-048, I PERB 537, 546 (1990). **[3]**

There, the PERB concluded that where a subject does not fall within a specific statutory exception thereby removing it from the duty to bargain, it be must determined whether the subject falls within the statutory definition of terms and conditions of employment under 19 Del.C. section 1302(q) and/or involves a matter of inherent managerial policy as defined under Employer rights at 19 Del.C. section 1305.

If the answer to either question is yes, the subject is mandatory or permissive respectively. If both questions are answered affirmatively, the balancing test adopted by PERB in Appoquinimink (Supra.) must be applied so that the critical question becomes "does the impact of the matter on the employer's operation as a

whole clearly outweigh the direct impact on the individual employees?"

Section 1305, of the Act, Public employer rights, provides:

> A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and the programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels, and the selection and direction of personnel.

Section 1305 expressly references "staffing" which includes determining the number and types of employees required to perform certain responsibilities required by the Employer.

Section 1302 (q), of the Act defines "Terms and conditions of employment." It provides:

> (q) "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures

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[3] Relevant provisions of the Public Employment Relations Act, (19 Del.C. Chapter 13), The Police Officers and Firefighters Employment Relations Act, (19 Del.C. Chapter 16 and the Public School Employment Relations Act, 14 Del.C. Chapter 40 are identical so that decisions issued under one Act serve as precedent for similar issues arising under another of the Acts.

> and working conditions; provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

There is no reference in Section 1302(q) to "staffing."

Staffing constitutes a fundamental and far-reaching right of management which touches upon not only the employer's financial and budgetary considerations but also the efficient utilization of its employees. In the absence of any reference to staffing in Section 1302(q), staffing decisions do not constitute a term and condition of employment about which the University was required to bargain but rather remain a matter of inherent managerial policy to be bargained at the University's discretion.

This determination does not, however, dispose of the current dispute. Section 1302 of the Act also provides, in relevant part:

> (e) Collective bargaining means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Wages, salaries and hours are expressly included in the definition of terms and conditions of employment set forth in section 1302(q), of the Act. In a prior decision involving health benefits, specifically dental and long-term disability, the PERB observed:

> In an early case under the NLRA analyzing the negotiability of health insurance, the First Circuit Court of Appeals held:
>
> > . . . we believe that it can safely be

> said that the term 'wages' in section 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. This is as far as we need to go, for so construed, the word covers a group insurance program for the reason that such program provides a financial cushion in the event of illness or injury arising out of the scope of employment at less cost than such cushion could be obtained through contracts of insurance negotiated individually. W.W. Cross and Co., 1st Cir., 174 F.2d 875 (1949).

The Seventh Circuit Court of Appeals in Inland Steel Co. (170 F.2d 247 (1948)) has similarly upheld the NLRB in finding pensions plans to be within matters " . . . in respect to rates of pay, wages, hours of employment and other conditions of employment". The Court found the promised pension **"** . . . to be as much a part of 'wages' as the money paid . . . at the time of services. In any event such a plan is one of the 'conditions of employment'." Inland Steel (Supra.)

Although the definition of mandatorily bargainable terms and conditions of employment under the Police Officers' and Firefighters' Employment Relations Act differs somewhat from the language of section 9(a) of the NLRA, (Footnote omitted) we find the logic of the cases cited above to be compelling. The doubling of available dental benefits and the provision of long term disability insurance are clearly direct and immediate economic benefits flowing to individual employees from the employment relationship which constitutes emoluments. It

> cannot be seriously disputed that these benefits constitute a part of consideration for work performed and are a condition of the individual's employment with the City. It is not the "relative significance" of these "peripherals" in comparison to the total benefit package which determines their negotiability, but rather their economic benefit to employees. As such, we here find them to be mandatory subjects of bargaining as matters concerning or related to wages, salaries and/or working conditions. **[4**] Local 1590 and FOP Lodge No. 1 v. City of Wilm. Del. PERB, ULP No. 89-09-041, I PERB 457, 468-469 (1990).

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[4] Section 9(a) of the National Labor Relations Act provides: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. . . . [29 U.S.C. section 169]
Accepting the logic of Local 1590 (Supra.), the subject of health benefits generally constitutes a term and condition of employment to which the statutory duty to bargain attaches.

In the current matter, the staffing decision made by the University represents only the first of several decisions which ultimately resulted in a unilateral change in the status quo of mandatory subjects of bargaining namely, hours of work, salaries and benefits. **[5]** Rather than negotiate with the Union concerning the impact of the change in the work schedule upon the hours of work, salaries and benefits of the affected employees, the University unilaterally altered the status quo of each.

The University argues, however, that, by its conduct, the Union waived its right to bargain over these or any other subject related to the initial decision to modify the work schedule. The University's position is unpersuasive. An effective waiver of the statutory right to bargain mandatory subjects must be clear and unmistakable and is evidenced by express contractual provisions, by bargaining history, or by a combination of the two." Local 1590 and FOP Lodge No. 1, (Supra.), at 465; citing American Distributing Co., Inc. v. NLRB, 9th Cir. 715 F.2d 446 (1983).

At the meeting of May 10, 2001, differing views concerning the duty to bargain were voiced by AFSCME Staff Representative Tony Camponelli and Clifton Coleman, Director of Human Resources. At the conclusion of their discussion, Mr. Camponelli stated words to the effect that, "You do what you have to do and we'll do what we have to do." At the very least, the University was on notice that the matter had not been totally resolved.

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[5] The status quo unilaterally altered by the University includes an annual twelve (12) month work schedule; fixed compensation payable over twelve (12) months and benefit coverage for twelve (12) months for which there is one (1) monthly deduction of the employees' premium contribution. The record is unclear whether during the months of June and July the employees are to be required to pay the employee's share of the monthly premium or the total amount.

Furthermore, the length of time between the initial conversation in the cafeteria involving Dr. Smith and Union President Trego in late April 2001, and the

filing of the charge on June 19, 2001 consisted of less than eight (8) weeks. On or about May 10, 2001, a meeting was held to discuss the situation.

The University acknowledges that in early June, 2001, during an informal conference concerning another matter, the Union's counsel raised the possibility that an unfair labor practice charge concerning these changes was being considered.

President Trego's statement to Dr. Smith that the benefits needed to be addressed is to be taken at face value. It indicates her concern for the benefit protection of the affected bargaining unit employees during the months of June and July rather than a blanket endorsement of the University's action.

Similarly, a statement attributed to Staff Representative Camponelli during the May 10, 2001, meeting that he appreciated the timeliness of the notice to the Union, is also entitled to be taken at face value and does not constitute a clear and unmistakable waiver of the Union's right to collectively bargain over the impact of the University's staffing decision on mandatory subjects of bargaining.

The Union's conduct does not support the University's claim of waiver. The totality of the circumstances is controlling and requires a finding that the Union did not engage in conduct sufficient to establish a clear and unmistakable waiver of its right to bargain over the affected terms and conditions of employment.

Concerning Counts II and III, of the Charge, the Union did not include in its opening brief any reference to a direct communication by the University to the bargaining unit employees. Consequently, the University withdrew its countercharge in its answering brief. Footnote 1 of the Brief provides:

> In its Opening brief, the Union alleged that the University refused to enter into collective bargaining regarding the modification of positions and therefore violated 19 Del C. §1305 (a) (5). The Union did **not** allege in its Brief, as it did in the initial unfair labor practice complaint, that the University had violated 19 Del. C. §1307(a) (1), (2), or (3), or that the University had committed an unfair labor practice by contacting bargaining unit employees directly and by communicating with bargaining unit members without first informing the Union representatives of the intended modifications.
>
> The University agrees with the Union that the only remaining issue in this proceeding is whether the University violated 19 Del. C. §1307 (a) (5) by not entering into collective bargaining with the Union over the proposed modification of positions. Because the Union has apparently conceded that there is no basis for the other allegations in its original complaint -- i.e., the allegations regarding direct contact with bargaining unit members and communication without prior notification to the Union -- the University sees no reason to pursue its counter-charge and accordingly withdraws that charge. (emphasis in original).

With knowledge of the University's position, the Union again failed to address the issue of direct contact by the University with bargaining unit members in its reply brief. Nor did the Union, in its reply brief or otherwise, indicate that, contrary to the University's position, it intended to pursue Counts II and III of the complaint. The record thereby establishes a tacit agreement by the parties that the sole issue before the PERB involves the alleged failure by the University to bargain before implementing a unilateral change in the status quo of mandatory subjects of bargaining in violation of Section 1307 (a) (5), of the Act.

CONCLUSIONS OF LAW

1. The Delaware State University ("University") is a public employer within the meaning of Section 1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

2. The American Federation of State, County and Municipal Employees, Council 81 is an employee organization within the meaning of Section 1302(i) of the Act and the exclusive bargaining representative of certain employees of the University within the meaning of Section 1302(j) of the Act.

3. The University's decision to modify the staffing of its Residence Halls was not a mandatory subject of bargaining but rather a matter of inherent managerial policy about which the University was not required to bargain.

4. However, by unilaterally altering the status quo of mandatory subjects of bargaining (hours, salaries and benefits) following that initial decision without first bargaining with the Union, the University violated 19 Del.C. Section 1307(a)(5).

5. The Union did not waive its right to negotiate the terms and conditions of the affected employees which are mandatory subjects of bargaining.

PURSUANT TO 19 Del.C. Section 1306, THE DELAWARE STATE UNIVERSITY IS HEREBY ORDERED TO:

A. Cease and Desist from implementing any unilateral change in the hours, salaries or benefits of bargaining unit members employed as Assistant Resident Managers or Night Desk Staff.

B. Maintain the status quo of the current hours, salaries and benefits of bargaining unit members employed as Assistant Resident Managers or Night Desk Staff.

C. Take the following affirmative action:

1. Issue a written recision of any and all notices and communications pertaining to the wages, salaries, hours and benefits of bargaining unit members employed as Assistant Resident Managers or Night Desk Staff.

2. Immediately upon receipt of this decision commence negotiations with the Union over any change in hours, salaries, and benefits resulting from the decision not to staff the residence halls with ARM-NDS employees during the months of June and July.

3. The parties are to advise the Public Employment Relations Board as to the status of the negotiations not later than April 30, 2002.

4. Within ten (10) calendar days from the date of receipt of this decision, post the attached NOTICE OF DETERMINATION at each location throughout the University where notices of general interest to bargaining unit employees are normally posted. The notice shall remain posted for a period of thirty (30) days.

IT IS SO ORDERED.

Dated: March 18, 2002

/s/Charles D. Long, Jr.
Charles D. Long, Jr.,
Executive Director/Hearing Officer